IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL WRIT PETITION NO. 3000 OF 2005

1. Saquib Abdul Hamid Nachan
and ors. ..Petitioners

Vs.

1. The State of Maharashtra and anr. ..Respondents

Mr. R.M. Agrawal with Mr. Girish R. Agrawal with Mr.Mubin H. Solkar for Petitioners.

Mr. S.R. Borulkar, P.P. with Mr. D.S. Mhaispurkar, APP for Respondents-State.

CORAM : B.H. MARLAPALLE & SMT. R.S. DALVI,JJ.

Date of Reserving : January 17, 2006.

Date of Pronouncement : January 30, 2006.

JUDGMENT (Per B.H. Marlapalle,J.):-

1. Heard Mr. R.M. Agrawal with Mr. G.R. Agrawal and Mr. Mubin Solkar the learned counsel for the petitioners and Mr. S.R. Borulkar, Public Prosecutor, with Mr. D.S. Mhaispurkar, APP for the Respondents.

. Rule. Respondents waive service.

. By consent of the parties, the petition was heard finally rather than considering the interim

prayer for being released the petitioners on bail.

2. This petition prays for a writ of habeas corpus or in the nature of habeas corpus against the respondents directing them to set the petitioners at liberty forthwith from the detention in POTA Special Case No.2 of 2003.

3. The petitioners claim to be the citizens of India and were taken in custody sometimes in April/May 2003 and they are presently under-trial in POTA Special Case No.2 of 2003 pending before the Special Court at Greater Mumbai and they are sought to be tried for three different offences of Bomb Blasts, namely, the Mulund Blast case (DCB-CID, C.R.No.21/03), the Vile-Parle Blast case (DCB-CID, C.R.No.9/03) and the Bombay Central Blast case (DCB-CID, C.R. No.59/03). The State has filed a joint/combined charge-sheet before the Special Court on 19/7/2003. The petitioner no.5 was not arrested and arraigned as an accused in the said case and, therefore, he objected to his being tried in a joint trial of all the three Bomb Blasts case. He objected to the same and contended that he must be tried separately only in respect of the Mulund Bomb Blast case and this

application was dismissed by the Special Court on 30/7/2005. Criminal Appeal No.716 of 2005 came to be filed before this court immediately against the said order and the said appeal was dismissed on 6/10/2005 by extending the interim stay for two weeks to enable the accused to approach the Supreme Court of India. It is admitted that the said interim stay to the trial of the special case has been continued as at present by the Apex Court.

4. It is contended by the petitioners that on and after 18/10/2005 there was no order of remand passed under Section 309 of Cr.P.C. thereby extending their judicial custody for such period and/or till such date as thought fit and, therefore, their confinement in prison since 18/10/2005 is nothing but illegal detention in view of the well settled legal position of law. The petitioners further contend that on 18/10/2005 the Sheristedar of the Special Court made the following endorsement on the warrants of the petitioners:-

> "Date will be informed to you later on when stay by the Hon’ble High Court is vacated."

. As per the petitioners this endorsement discloses a blatant violation of the mandatory provisions of Section 309 of Cr.P.C. As per them in the absence of any reasoning being given by the Special Court, coupled with the fact that no particular date or period was mentioned when the petitioners were to be produced again before the Special Court, their subsequent detention is wholly illegal and in utter violation of the procedure established by law. The inaction on the part of the Special Court in not passing the remand order extending the custody on or after 18/10/2005 for a fixed period/date has rendered the confinement of the petitioners in judicial custody as illegal, even though the trial of the Special Case No.2 of 2003 has been stayed by this court and/or by the Apex Court. This detention of the petitioners in the Central Prison at Thane is in gross violation of the protection guaranteed under Article 21 of the Constitution, urged Mr. Agrawal, the learned counsel for the petitioners.

5. Admittedly, the petitioner no.2 is no more in

detention as he has been released on bail during the pendency of this petition and, therefore, this petition is required to be considered for the remaining 12 petitioners. The State has filed replies and opposed the petition. It is submitted that the Special Court has passed an order of remand after the charge-sheet was filed on 19/7/2003 as required under Section 309 of Cr.P.C. and, therefore, the detention of the petitioners pending the trial before the Special Court, is not illegal and in any case the guarantee enshrined under Article 21 of the Constitution has not been violated. It is pointed out that the petitioners were produced before the Special Court on 23/9/2005 and due to the stay granted by this court, the case was adjourned to 18/10/2005 on which date also they were produced before the Special Court. The case was adjourned to 16/11/2005 and on that date the learned Special Judge adjourned the case on account of the interim stay granted by the Supreme Court in a Criminal Misc. Petition along with SLP filed by the petitioner no.1. The learned Special Judge also passed an order under Section 317(1) of Cr.P.C. dispensing with the attendance of the accused in POTA Special Case Nos.1/03 and 2/03, by way of interim measure, by his order dated 9/10/2003 and, therefore, the accused including the petitioners were

not produced before the Special Court on the subsequent dates. As per the respondents under the scheme of Section 29 of the Prevention of Terrorism Act, 2002 (the Act), the Special Court acts as a Magistrate initially and subsequently, after the charge-sheet is filed, it tries the case as a Court of Session under Sub-Section 3 of the said Section. So far as the procedure is concerned, the general provisions of Cr.P.C. are applicable subject to the modified application of certain provisions of the said Code under Section 49 of the Act. Mr. Borulkar, the learned Public Prosecutor, submitted that once a remand order under Section 209 (b) of Cr.P.C. was passed by the Special Court, pending the trial and till its conclusion, no further order under Section 309 of Cr.P.C. was required to be passed. Mr. Agrawal, the learned counsel for the petitioners, per contra, submitted that the provisions of Section 209 are not applicable to the present case instituted under the Act as there is no question of passing an order of commitment of a case to the Court of Session and, therefore, any order passed under Section 209(b) is a nullity in law and in the absence of a specific order of remand under Section 309 of Cr.P.C., the detention of the petitioners is illegal and unconstitutional from 18/10/2005 onwards. A host of

judgments have been referred to and relied upon by the respective parties and some of the relevant judgments will be considered later.

6. The record shows that on 19/7/2003 the charge-sheet was filed and on 22/7/2003 when all the 16 accused were present before the Special Court, the following order regarding the remand came to be passed:-

> "All accused are now remanded to judicial custody until disposal of the case."

The learned Judge of the Special Court did not state whether he passed this order under Section 209(b) or 309(2) of Cr.P.C.

. As per Mr. Agrawal this is not an order of remand passed under Section 309(2) of Cr.P.C. and the provisions of Section 209(b) of Cr.P.C. are not applicable to the Special Court and, therefore, the petitioners are continued in illegal detention.

Sections 209 and 309(2) of Cr.P.C. read as under:-

"**209. Commitment of a case to Court of Session when offence is triable exclusively by it**

When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

(a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of the trial;

(c) send to the court the record to the case the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

309. Power to postpone or adjourn proceedings-

(1) .....

(2) If the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such times it considers reasonable, and may by a warrant remand the accused if in custody.

> Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time."

. Mr. Agrawal fairly conceded that this outer limit of 15 days set out in the proviso for the orders to be passed by the Magistrate is not applicable to the orders of remand to be passed by the Special Court which conducts the special cases as the Court of Sessions.

7. In the case of Vaijanath Trimbak Patre vs. The State of Maharashtra reported in **2000 (5) Bom.C.R. 718**, one of us (Marlapalle,J.) considered the scheme of Sections 167, 209 and 309 of Cr.P.C. and held that these three sections are independent of each other and they must be so read and applied. Section 209 of Cr.P.C. mandates the Magistrate to pass an order of committal if the offence levelled against the accused is not triable by him and is exclusively triable by the Sessions Court or by any other Court. The said section makes it obligatory on the part of the Magistrate to remand the accused to custody on committing the case to the Court of Sessions. Though the Magistrate is required to specifically state in the order of committal that the accused is remanded to

the custody during and until conclusion of the trial, absence of such a specific order would amount to a mere irregularity and even if such an irregularity is there it does not, per se, mean that the detention of the accused in custody would be illegal. Sub-Section 2 of Section 309 provides for the postponement of the commencement of the trial or the adjournment in the inquiry of trial and while doing so, the Court is empowered to remand the accused in custody. Once the committal order has been passed and the accused is remanded to the custody or the authority has been asked to take the accused in custody and produce before the trial court, the provisions of Section 309 will come into play, which deal with the custody of the accused during inquiries or trial and there is no discretion left but to grant judicial custody. The learned Public Prosecutor advanced his arguments mainly contending that the remand order passed on 22/7/2003 is an order passed under Section 209(b) of Cr.P.C. and, therefore, the petitioners cannot be held to be under illegal detention.

8. Taking into consideration the stand of the respective parties, we are required to consider,

(a) Whether the remand order dated 22/7/2003 is passed under Section 209(b) of Cr.P.C.?

OR

(b) Whether the said order is passed under Section 309(2) of Cr.P.C.?,

and to decide these questions, we need to consider the status of the Special Court constituted under the Act. This issue of status is no more res integra in view of the Constitution Bench decision in the case of A.R. Antulay Vs. Ramdas Sriniwas Nayak and anr. reported in **AIR 1984 SC 718**. In para 27 of the said decision, the Apex Court elaborately discussed the status of the Special Court and, inter alia, stated thus:

> ".....If a special Judge has to take cognizance of offences, ipso facto the procedure for trial of such offences has to be prescribed. Now the Code prescribes different procedures for trial of cases by different Courts. Procedure for trial of a case before a Court of Session is set out in Chapter XVIII; trial of warrant cases by Magistrate is set out in Chapter XIX and the provisions therein included catered to both the types of cases coming before the Magistrate, namely, upon police report or otherwise than on a police report. Chapter XX prescribes the procedure for trial of summons cases by Magistrates and Chapter XXI prescribes the procedure for summary trial. Now that a new Criminal Court was being set up, the Legislature took the first step of providing

its comparative position in the hierarchy of Courts under Section 6 Cr.P.C. by bringing it on level more or less comparable to the Court of Session, but in order to avoid any confusion arising out of comparison by level, it was made explicit in Section 8(1) itself that it is not a Court of Session because it can take cognizance of offences without commitment as contemplated by Section 193, Cr.P.C. Undoubtedly in Section 8(3) it was clearly laid down that subject to the provisions of sub-sections (1) and (2) of Section 8, the Court of special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors. In contradistinction to the Sessions Court this new Court was to be a Court of original jurisdiction. The Legislature then proceeded to specify which out of the various procedures set out in the Code, this new Court shall follow for trial of offences before it. Section 8(1) specifically says that a special Judge in trial of offences before him shall follow the procedure prescribed in the Criminal P.C. for trial of warrant cases by Magistrates. The provisions for trial of warrant cases by the Magistrate are to be found in Chapter XXI of 1898 Code. A glance through the provisions will show that the provisions therein included catered to both the situations namely, trial of a case initiated upon police report (Section 251-A) and trial of cases instituted otherwise than on police report (Sections 252 to 257). If a special Judge is enjoined with a duty to try cases according to the procedure prescribed in foregoing provisions he will have to first decide whether the case was instituted upon a police report or otherwise than on police report and follow the procedure in the relevant group of sections. Each of the Sections 251-A to 257 of 1898 Code which are in pari materia with Sections 238 to 250 of 1973 Code refers to what the Magistrate should do. Does the special Judge, therefore, become a Magistrate? This is the fallacy of the whole approach. In fact, in order to give full effect to Section 8(1), the only thing to do is to read special Judge in Sections 238 to 250 wherever the expression ‘Magistrate’ occurs. This is what is called legislation by

> incorporation. Similarly, where the question of taking cognizance arises, it is futile to go in search of the fact whether for purposes of Section 190 which conferred power on the Magistrate to take cognizance of the offence, special Judge is a Magistrate. What is to be done is that one has to read the expression 'special Judge' in place of Magistrate, and the whole thing becomes crystal clear. The Legislature wherever it found the grey area clarified it by making specific provision such as the one in sub-section (2) of Section 8 and to leave no one in doubt further provided in sub-section (3) that all the provisions of the Criminal P.C. shall so far as they are not inconsistent with the Act apply to the proceedings before a special Judge.

. Regarding the powers of the Special Courts i.e. the courts constituted under any law within the meaning of Section 6 of Cr.P.C., the Supreme Court stated,

> ".... The net outcome of this position is that a new Court of original jurisdiction was set up and whenever a question arose as to what are its powers in respect of specific questions brought before it as Court of original criminal jurisdiction, it had to refer to the Criminal P.C. undaunted by any designation claptrap. When taking cognizance, a Court of special Judge enjoyed the powers under Sec.190. When trying cases, it is obligatory to follow the procedure for trial of warrant cases by a Magistrate though as and, by way of status it was equated with a Court of a special Judge for a certain purpose is a Court of Magistrate or a Court of Session revolves round a mistaken belief that a special Judge has to be one or the other, and must fit in the slot of a Magistrate or a Court of Session. Such an approach would strangulate the functioning of the Court and must be eschewed. Shorn of all embellishment,

> the Court of a special Judge is a Court of original criminal jurisdiction and under the Code it will enjoy all powers which a Court of original criminal jurisdiction enjoys save and except the ones specifically denied."

9. The law laid down by the Constitution Bench in A.R. Antulay's case (Supra) has well defined the status and powers of the Special Court and the procedural requirements which such a Court has to follow under the Criminal Procedure Code as the Court of original criminal jurisdiction save and except those specifically excluded by the Act. As noted hereinabove, under the scheme of Section 29 of the Act, the Special Court, in the instant case, is initially clothed with the powers of a Magistrate and subsequently on filing of the charge-sheet, it is clothed with the powers of the Court of Session, save and except the modified applications of certain provisions of the Code as set out under Section 49 of the Act. It has to play a dual function of the Magistrate initially and subsequently as the Court of Session and, therefore, the arguments advanced by Mr. Agrawal that the provisions of Section 209 of Cr.P.C. are not applicable to the Special Court established under the Act will have to be accepted. If there is no stage of commitment of the case, obviously the scheme of Section 209 of Cr.P.C. in its entirety will

not be applicable to the Special Court under the Act. We, therefore, record a finding that the provisions of Section 209(b) of the Cr.P.C. are not applicable to the Special Court and consequently the remand order passed on 22/7/2003 cannot be treated to be an order under the said provision.

10. Section 309(1) of Cr.P.C. states that in every inquiry or trial, the proceeding shall be held as expeditiously as possible and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. Whereas sub-section 2 (as reproduced hereinabove) states that if the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such times it considers reasonable, and may by a warrant remand the accused if in custody. A bare reading of this provision clearly goes to show

that it applies after the court has taken cognizance of an offence or when an inquiry or trial is adjourned after taking cognizance or on commencement of trial and while doing so it may by a warrant remand the accused if in custody. This is obviously a general power governing the procedure for inquiry or trial and after the Special Court has taken cognizance of an offence and, therefore, it could be invoked at any stage. The trial before a Court of Session is governed by the scheme of Chapter XVIII of Cr.P.C. and Section 226 states about the opening of the case of the prosecution, whereas Section 227 provides for discharge and Section 228 sets out the procedure for framing the charge. In the instant case it cannot be said that the prosecution case has already been opened immediately after the charge-sheet was filed on 22/7/2003. It appears that in view of the interim stay granted by this Court and subsequently continued by the Apex Court, the Special Court has not yet framed the charge. The Special Court cannot be deprived of the general powers of passing an order of remand under the provisions of Cr.P.C. and if the provisions of Sections 167 and 209(b) are not applicable on account of the progress in the inquiry or the special nature of the inquiry, obviously, the powers of remand will have to be read into the scheme

of Section 309(2) of Cr.P.C. In the case of State of U.P. Vs. Lakshmi Brahman and anr. reported in **AIR 1983 SC 439** this aspect has been succinctly dealt with by the Apex Court in para 13 in the following words:-

> "13. Now, if under Sec.207, the Magistrate is performing a judicial function of ascertaining whether copies have been supplied or not, it would undoubtedly be an inquiry for the purpose of satisfying himself that Sec. 207 has been complied with in letter and spirit. That satisfaction has to be judicial satisfaction. It is not a trial but something other than a trial and being judicial function it would necessarily be an inquiry. The making of an order committing the accused to the Court of Session will equally be a stage in the inquiry and the inquiry culminates in making the order of commitment. Thus, from the time the accused appears or is produced before the Magistrate with the police report under Sec. 170 and the Magistrate proceeds to enquire whether Sec.207 has been complied with and then proceeds to commit the proceeding before the Magistrate would be an inquiry as

contemplated by Sec. 2(g) of the Code. We find it difficult to agree with the High Court that the function discharged by the Magistrate under Sec. 207 is something other than a judicial function and while discharging the function the Magistrate is not holding an inquiry as contemplated by the Code. If the Magistrate is holding the inquiry obviously Sec. 309 would enable the Magistrate to remand the accused to the custody till the inquiry to be made is complete. Sub-sec. (2) of Sec. 309 provides that if the Court, after taking cognizance of an offence or commencement of trial, finds it necessary or advisable to postpone the commencement or adjourn any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. There are three provisos to sub-sec. (2) which are not material. If, therefore, the proceedings before the Magistrate since submission of the police report under Sec. 170 and till the order of commitment is made under Sec. 209

would be an inquiry and if it is an inquiry, during the period, the inquiry is completed, Sec. 309(2) would enable the Magistrate to remand the accused to the custody...."
(Emphasis supplied)

11. The Special Court, while holding the inquiry, acts as a Magistrate and obviously Section 309 would enable the Magistrate/Special Court to remand the accused to the custody till the inquiry to be made is complete and the Special Court, if after taking cognizance of the offence or commencement of trial, finds it necessary or advisable to postpone or adjourn any inquiry or trial, it may, from time to time, for the reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may by a warrant remand the accused if in custody. By following the law laid down in Lakshmi Brahman's case (Supra), it is evident that the order of remand passed by the Special Court on 22/7/2003, in the instant case, is an order passed under Section 309(2) of Cr.P.C. and the said order specifically states that the accused have been remanded to judicial custody until the disposal of the case. This is a valid and legal order passed under

Section 309 (2) of Cr.P.C. until the disposal of the case and in no way the detention of the petitioners is vitiated on account of their not being presented before the Special Court, even though the trial of the Special Case has been presently stayed. The contentions that inspite of the stay operating against the trial of the case, the petitioners are required to be presented before the Special Judge and unless the Court passes the order of remand on each such day of attendance, their detention is illegal or unconstitutional, cannot be accepted. Section 309(2) of Cr.P.C. empowers the Special Court to pass the remand order until the disposal of the Special Case. It is pertinent to note that the order of dispensation of attendance passed under Section 317(1) of Cr.P.C. as well as the order of remand passed on 22/7/2003 and held by us to be an order under Section 309(2) of the Code are not under challenge in this petition nor were they challenged at any time in the past. We have also noted from the record that the order passed under Section 317(1) of Cr.P.C. was subsequently revoked on 17/11/2003 as the accused were directed to be produced before the Special Court on 24/11/2003 and the accused continued to remain present on the basis of the production warrants signed by the Sheristedar, City Civil and Sessions Court, Gr. Bombay till 10/10/2005

and this goes to show that the accused were aware about the remand order having been passed on 22/7/2003 till the completion of the trial.

. We, therefore, hold that the contentions of the petitioners that they are held in detention as at present illegally or in violation of their rights under Article 21 of the Constitution cannot be accepted as they have no force in law and, therefore, this petition must fail.

12. In the premises, the petition is dismissed. Rule is discharged.

(Smt.R.S. Dalvi,J.) **(B.H. Marlapalle, J.)**